Customs Bulletin

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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 159

(T.D. 90–1)

BULLETIN NOTICE OF LIQUIDATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to eliminate references to Customs Form 4335 which was designed to serve as a bulletin notice of liquidation for entries liquidated as free of duty. That form is now obsolete and is being eliminated. Customs Form 4333 will serve as a bulletin notice of liquidation for all entries regardless of the dutiable status of the merchandise.

EFFECTIVE DATE: December 26, 1989.

FOR FURTHER INFORMATION CONTACT: Ilene Gilbert, Entry Programs Branch, Office of Trade Operations, (202)–535–4408.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 159, Customs Regulations (19 CFR Part 159), provides that Customs Form 4335 shall be used as a bulletin notice of liquidation for free consumption entries liquidated "as entered" and permanent exhibits entries liquidated "Free". In recent years such form has fallen into disuse and Customs Form 4333, generally computer generated, has been utilized as a bulletin notice for all entries. This has been confirmed through a survey of Customs field offices. Therefore, Customs Form 4335 is obsolete and it is being eliminated as are references to it in the Customs Regulations. Customs Form 4333 will continue to be used as the bulletin notice of liquidation for all entries regardless of the dutiable status of the merchandise covered thereby.

EXECUTIVE ORDER 12291

These amendments do not constitute a "major rule" as defined in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act (5 U.S.C. *et seq.*), are not applicable to these amendments because the rule will not have a significant economic impact on a substantial number of small entities.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

These amendments merely eliminate one of the Customs forms used as a bulletin notice of liquidation and provide that the remaining form shall be utilized for all such notices. They neither impose any additional burdens on, or take away any existing rights or privileges from the public. Therefore, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(2), a delayed effective date is not required.

DRAFTING INFORMATION

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 159

Customs duties and inspection, Imports, Liquidation of duties.

AMENDMENTS TO THE REGULATIONS

Part 159, Customs Regulations (19 CFR Part 159), is amended as set forth below:

PART 159—LIQUIDATION OF DUTIES

1. The authority citation of Part 159 continues to read as follows:

Authority: 19 U.S.C. 66, 1500, 1624. Subpart C also issued under 21 U.S.C. 372. Additional authority and statutes interpreted or applied are cited in the text or following the section affected.

2. Section 159.9 as amended by revising paragraphs (a) and (d) to read as follows:

§ 159.9 Notice of liquidation and date of liquidation for formal entries.

(a) *Bulletin notice of liquidation.* Notice of liquidation of formal entries shall be made on a bulletin notice of liquidation, Customs Form 4333.

* * * * * * *

(d) *Courtesy notice of liquidation.* Customs will endeavor to provide importers or their agents with Customs Form 4333–A, "Courtesy Notice," for all entries scheduled to be liquidated or deemed liquidated by operation of law. This notice shall serve as an informal, courtesy notice and not as a direct, formal and decisive notice of liquidation.

Sections 159.10, 159.11 and 159.12 [amended]

3. In sections 159.10(c)(3), 159.11(a) & 159.12(g) remove the word and number "or 4335".

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: December 4, 1989.

SALVATORE R. MARTOCHE,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 26, 1989 (54 FR 52933)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Gregory W. Carman
Jane A. Restani
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Decisions of the United States Court of International Trade

(Slip Op. 89–163)

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., AND CEMENTOS VERACRUZ, S.A., PLAINTIFFS, CEMENTOS ANAHUAC DEL GOLFO, S.A., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT

Court No. 86–12–01525

CEMENTOS ANAHUAC DEL GOLFO, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86–12–01607

[Plaintiffs' motions to extend injunctions staying liquidation pending appeal are denied; the temporary restraining orders are vacated.]

(Decided November 22, 1989)

Ross & Hardies, (Joseph S. Kaplan and *Michael F. Forte)* for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*) for the defendant.

MEMORANDUM AND ORDER

CARMAN, *Judge:* Plaintiffs moved on November 14, 1989 pursuant to USCIT Rules 7 and 62(c) to extend the injunctions issued in these two cases by this Court on June 30, 1988, which stayed the liquidation of the subject entries of portland hydraulic cement and cement clinker from Mexico, pending appeal of the cases. Additionally, on November 14, 1989, plaintiffs moved pursuant to USCIT Rule 65(b), by orders to show cause returnable on November 16, 1989, for a hearing why orders should not be entered: (1) staying any proceedings or actions to enforce the judgments of this Court dated April 27, 1988 and June 9, 1988 pending disposition by the United States Supreme Court of these actions; and (2) enjoining defendant and its agents from liquidating any unliquidated entries which were the subject of these actions.[1]

[1]This Court issued a judgment on April 27, 1988, pursuant to its opinion bearing the same date, denying plaintiffs' motion for summary judgment and dismissing Court No. 86–12–01525. *Cementos Guadalajara, S.A. v. United States,* 686 F. Supp. 335 (1988). Plaintiff filed their notice of appeal and the case was docketed on May 19, 1988.

On June 9, 1988 this Court issued an opinion and judgment denying plaintiff's motion for summary judgment and dismissing Court No. 86–12–01607. *Cementos Anahuac del Golfo, S.A. v. United States,* 689 F. Supp. 1191

Continued

Simultaneously plaintiffs applied for and obtained a temporary restraining order in each of the above-captioned cases staying any action to enforce the judgments of this Court dated April 27, 1988 and June 9, 1988, pending the outcome of plaintiffs' motions to extend the injunctions issued by this Court on June 30, 1988.

A hearing was held on November 16, 1989.[2] At the hearing it was clarified that the temporary restraining orders were continued to November 25, 1989. Further briefing was requested.

At issue in these cases are two consent injunctions issued on June 30, 1988, in which this Court stayed liquidation in these cases pending their appeal. The injunction in Court No. 86–12–01525 prohibited defendant from liquidating any of the entries affected by the judgment of April 27, 1988 pending appeal. The order granting the injunction provided in part:

> ORDERED that the execution of any proceedings to enforce the judgment of this Court dated April 27, 1988 be stayed *pending the disposition of the appeal of this action* * * *.

(Emphasis added). The injunction in the companion case, Court No. 86–12–01607, relating to this Court's judgment dated June 9, 1988, employed identical language. In each case the injunctions were sought and granted after notice of appeal had been filed with the Court of Appeals for the Federal Circuit but prior to the issuance of its mandate.

The Federal Circuit issued its opinion and judgment affirming the decisions of this Court on July 13, 1989.[3] On August 14, 1989 plaintiffs moved in the Court of Appeals for a rehearing and suggested en banc review. The petition for rehearing was denied on September 12, 1989 and decision was reserved on the suggestion for en banc review. On September 18, 1989 plaintiffs requested a stay of the issuance of the mandate of the Court of Appeals until seven days after the issuance of the decision on its suggestion for en banc review. The court granted this motion September 21, 1989. On October 19, 1989 the petition for a rehearing en banc was denied. The mandate issued from the Court of Appeals on October 26, 1989.[4] Counsel for the defendant informs this Court the Government is readying to liquidate all entries.

(1988). Shortly thereafter, plaintiff filed its notice of appeal, which was docketed on June 29, 1988, the day before this Court issued the injunctions staying liquidation pending the appeals.

Plaintiffs seek to stay the execution of the judgments in these two cases pending their petition for certiorari to the Supreme Court.

[2]Plaintiffs have also moved for similar injunctive relief in a case before Judge Thomas J. Aquilino, *Cementos Anahuac del Golfo, S.A. et al.* v. *United States*, Court No. 86–01–00082. Due to the similarity of the facts and issues in that case and the two cases that are the subject of this memorandum all three cases were heard by consent jointly before Judge Aquilino and me.

[3]*Cementos Guadalajara, S.A.* v. *United States*, 879 F.2d 847 (Fed. Cir. 1989). In that case, consolidating three related cases for appeal, the Court of Appeals upheld the opinions concerning the cases now before this Court (*Cementos Guadalajara, S.A.* v. *United States*, 686 F. Supp. 335 (1988) (Court No. 86–12–01525) and *Cementos Anahuac del Golfo, S.A.* v. *United States*, 689 F. Supp. 1191 (1988) (Court No. 86–12–01607)), and reversed *Cementos Anahuac del Golfo, S.A.* v. *United States*, 687 F. Supp. 1558 (1988) (Court No. 86–01–00082).

[4]The parties stipulated to these procedural facts in open court at the hearing on this matter on November 16, 1989. Plaintiffs' counsel claims it did not receive notice of the denial of their suggestion for en banc review or notice of the issuance of the mandate until October 23, 1989, three days before the mandate issued.

DISCUSSION

Plaintiffs assert that these motions are governed by Rule 8(a) of the Federal Rules of Appellate Procedure[5] which provides that an application for a stay of judgment or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made to the District Court in the first instance. Defendant contends that plaintiffs' applications to stay any further proceedings in these matters pending disposition of these actions by the Supreme Court of the United States should be denied because a stay of an appellate decision pending application to the Supreme Court for a writ of certiorari should be made to the Court of Appeals for the Federal Circuit, in accordance with Rule 41(b) of the Federal Rules of Appellate Procedure.[6] Defendant points out in the alternative that plaintiffs could have used the procedures outlined in Supreme Court Rule 44.[7]

[5]Rule 8(a) of the Federal Rules of Appellate Procedure states:

Rule 8. Stay or Injunction Pending Appeal.

(a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

[6]Federal Rule of Appellate Procedure 41 states:

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

[7]Supreme Court Rule 44 states in pertinent part:

Rule 44. Stays

.1. A stay may be granted by a Justice of this Court as permitted by law; and a writ of injunction may be granted by any Justice in a case where it might be granted by the Court.

.2. Whenever a party desires a stay pending review in this Court, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or to a Justice of this Court, a motion to stay the enforcement of the judgment of which review is sought * * *.

.3. A petitioner entitled thereto may present to a Justice of this Court an application to stay the enforcement of the judgment sought to be reviewed on certiorari. 28 U.S.C. § 2101(f).

.4. An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof. Any application must identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set forth with specificity the reasons why the granting of a stay or injunction is deemed justified. Any such application is governed by Rule 43.

* * * * * * *

See also, 28 U.S.C. § 2101(f) (1982).

There is no question that provisions exist enabling litigants to obtain a stay of a Court of Appeal determination which is subject to review by the Supreme Court on a writ of certiorari by seeking such relief from a judge of the Court of Appeals or a Justice of the Supreme Court. *See* Sup. Ct. R. 44; 28 U.S.C. § 2101(f); Fed. R. App. P. 41(b). The more difficult questions presented to this Court are 1) whether this Court, a trial court, has the power to grant an injunction staying execution of its judgment pending the disposition of a party's petition for certiorari, when the mandate has already issued from the Court of Appeals and the parties have not sought such relief before any appellate court; and 2) whether if this Court has jurisdiction, it should exercise that jurisdiction.

Defendant asserts, citing *In re Stumes,* 681 F.2d 524, 525, (8th) Cir. 1982), *Studiengesellschaft Kohle* v. *Novamont Corp.,* 578 F. Supp. 78, 79 (S.D.N.Y. 1983), *Hovater* v. *Equifax Services, Inc.,* 669 F. Supp. 392, 393 (N.D. Ala. 1987) and *Mister* v. *Illinois Central Gulf R.R. Co.,* 680 F. Supp. 297, 298 (S.D. Ill. 1988), that this Court lacks jurisdiction except to implement the mandate of the Court of Appeals.

Plaintiffs contend that an injunction staying execution of a judgment pending an appeal may be granted by a district court even after a mandate has issued from the court of appeals, provided that the stay is not inconsistent with the mandate and does not reach the merits of the judgment. Plaintiffs cite to cases construing a district court's inherent equity powers and the All Writs Act, 28 U.S.C. § 1651, as authority for this proposition. Plaintiffs assert that a federal court has the authority to issue such injunctions as may be necessary to protect its jurisdiction and its power to render a binding judgment.

Federal Rule of Appellate Procedure 8(a) clearly contemplates that a district court may entertain a motion to stay the execution of its judgment pending disposition in the court of appeals in the first instance. *See* footnote 5 *supra.* There is no question that this Court maintains the power to grant a stay of execution of *its* judgment pending disposition by the Court of Appeals *before* the mandate has issued. *Rakovich* v. *Wade,* 834 F.2d 673, 673–74 (7th Cir. 1987) (and citations therein).

In *Rakovich* notice of appeal had been filed with the circuit court but a mandate had not issued. A party moved in the Court of Appeals for a stay pending the appeal. In remanding the case to the district court for a determination of the propriety of the stay, the Court observed, citing *Newton* v. *Consolidated Gas Co. of New York,* 258 U.S. 165 (1922), that a district court retains the power to maintain the status quo by granting a stay of its judgment pending appeal. *Id.*

In *Newton*, the Supreme Court observed:

> The amendatory decree * * * was obtained long after appeals from the * * * decree had been granted and when the court had very limited power over the litigation. "One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the Court below to proceed further in the cause." Undoubtedly, after appeal the trial court may, if the purposes of justice require, preserve the status quo until decision by the Appellate Court.

258 U.S. at 177 (citation omitted).

Certainly, it is well established that an inferior court has no power or authority to deviate from the mandate of the appellate court. *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948); *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). However, as Justice Rehnquist observed as Circuit Justice in *Hawaii Housing Authority* v. *Midkiff*, 463 U.S. 1323, 1324 (1983) (citing *Newton* with approval):

> Whatever the current application of the so-called jurisdictional shift theory to modern appellate procedure, *it is well settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pending of an appeal even to this Court.*

(Citations omitted, emphasis added).

There is no doubt that liquidation of the entries in this case, pursuant to this Court's judgement as affirmed, would affect the status quo pending plaintiffs' petition for certiorari. Liquidation of the entries prior to the determination by the Supreme Court of the petition for certiorari would cause irreparable injury to the plaintiffs and deprive them of the relief they are seeking even if the Supreme Court were to rule in their favor. *Cf. Zenith Radio Corp.* v. *United States*, 1 Fed. Cir. (T) 74, 710 F.2d 806 (1983).

This Court holds that while it can be argued that the Court is empowered to grant the relief requested to maintain the status quo, if such power exists, these are not the circumstances under which this Court should exercise that power.

In a case where the court of appeals has issued its opinion but not its mandate, Federal Rule of Appellate Procedure 41(b) clearly provides parties the opportunity to petition the court of appeals for a stay of the issuance of its mandate pending application for certiorari. *See* footnote 6 *supra*. In addition, Supreme Court Rule 44.2. provides that "[w]henever a party desires a stay pending review in this Court, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or to a Justice of this Court, a motion to stay the enforcement of the judgment of which review is sought." However, such relief can rarely be obtained unless the application for the stay "first has been made to the appropriate court or courts below, or to a judge or judges thereof." Sup. Ct. R. 44.4.

The import of these rules is that even where a district court arguably has the power to grant an injunction staying execution of a judgment pending a petition for certiorari, absent extraordinary circumstances, the court of appeals is the appropriate forum to hear the application.[8]

As Justice Rehnquist has stated in his capacity as Circuit Justice, "the threshold barrier confronting all stay applications [is whether there is] reasonable likelihood that the petition for certiorari will be granted." *Houchins* v. *KQED, Inc.*, 429 U.S. 1341, 1345 (1977); *see also Brennan* v. *United States Postal Service*, 439 U.S. 1345, 1346 (Marshall, Circuit Justice 1978) (there must be a showing of a balance of hardships in favor of the party requesting the stay). In *Barefoot* v. *Estelle*, 463 U.S. 880, 895 (1983) the Supreme Court stated:

> It is well established that there "must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed."

Id. (quoting *White* v. *Florida*, 458 U.S. 1301, 1302 (1982)).

Since it is the decision of the Federal Circuit that will be contested in the petition for certiorari, that court is in the best position to address the merits of plaintiffs' stay application. *See Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923). This Court was not privy to the arguments of the parties concerning the appeal itself, the motion for rehearing or the suggestion for rehearing en banc. Furthermore, at no place in their briefs or during oral argument did plaintiffs apprise this Court of the basis contemplated for their certiorari petition. Consequently, this Court is bereft of any basis upon which to address these considerations.

Additionally, any hardship the decision of this Court bestows upon the plaintiffs in this case results from plaintiffs' own acts.[9] While before the Federal Circuit plaintiffs availed themselves of Fed. R. App. P. 41(a) to obtain a stay of the issuance of the mandate pending their applications for a rehearing or en banc review. It would have been appropriate at that time to seek relief in the form of a stay pending review on certiorari under Fed. R. App. P. 41(b). Plaintiffs have advanced no reasons to this Court why they could not have petitioned the Federal Circuit for the stay. Even after the Appeals Court decision and the issuance of the mandate, plaintiffs still had the opportunity to petition for recall of the mandate upon a

[8]Even courts that have found a lack of jurisdiction to grant the stay have recognized the propriety of petitioning the appeals courts in the first instance where practicable. *See e.g., Studiengesellschaft Kohle* v. *Novamont Corp.*, 578 F. Supp. at 80; *Mister* v. *Illinois Central Gulf R.R. Co.*, 680 F. Supp. at 299.

[9]Apparently the mandate would have issued on August 3, 1989, 21 days after the issuance of the opinion of the Court of Appeals, but for plaintiffs' various applications to the court. *See* Fed. R. App. P. 41(a). As it was, the mandate issued on October 26, 1989, 105 days after the issuance of the court's decision in the case, affording counsel ample opportunity to consult with their clients.

showing of good cause. *See e.g., Johnson* v. *Bechtel Assocs. Professional Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986) (and citation therein at notes 19 and 20). Additionally, after the issuance of this memorandum and order, it would appear that plaintiffs are not precluded from obtaining relief in superior courts.

CONCLUSION

On the basis of the foregoing, this Court denies plaintiffs' applications for extension of the injunctions. Accordingly, the temporary restraining orders as extended are vacated.

(Slip Op. 89–164)

CEMENTOS ANAHUAC DEL GOLFO, S.A., PLAINTIFF *v.* UNITED STATES, AND MALCOM BALDRIGE, SECRETARY OF COMMERCE, DEFENDANTS

Court No. 86–01–00082

MEMORANDUM AND ORDER

[Plaintiff's application to continue suspension of liquidation granted in part and denied in part.]

(Dated November 24, 1989)

Ross & Hardies (*Joseph S. Kaplan* and *Michelle F. Forte*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*) for the defendants.

AQUILINO, *Judge:* This case was remanded to the International Trade Administration, U.S. Department of Commerce ("ITA") for reconsideration of its first administrative review of its *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker from Mexico*, 48 Fed. Reg. 43,063 (Sept. 21, 1983), in the light of the court's slip op. 88–58, 12 CIT ——, 687 F. Supp. 1558 (1988), which held that no countervailing duties could be imposed upon entries of the indicated merchandise for the period July 1 through December 31, 1983 unless it was determined that those entries, by reason of subsidy, were causing or threatening to cause material injury to an industry in the United States or that they retarded materially the establishment of an industry in the United States. The court's order of remand also enjoined the defendants from imposing duties on the entries in the absence of a determination of such injury.

The defendants appealed from the order, which was reversed by the U.S. Court of Appeals for the Federal Circuit *sub nom. Cementos Guadalajara, S.A.* v. *United States*, 879 F.2d 847 (1989). A petition for rehearing, including a suggestion that it occur *en banc*, was then filed. The original three-judge panel denied rehearing by it in an or-

der which also indicated that the court's mandate would issue on September 19, 1989. Prior thereto, the plaintiff-appellee sought (and obtained) a stay of the mandate until seven days after the still-outstanding suggestion of rehearing by the full court had been resolved, but, in an order dated October 19, 1989, the suggestion was declined, and the judgment of the court of appeals issued as a mandate on October 26, 1989.

The plaintiff has now returned with an application to extend this court's injunction of liquidation upon a representation that it intends to petition the Supreme Court of the United States for a writ of certiorari. A hearing was held on November 16, 1989 in this case and also in cases before Judge Carman of this Court of International Trade *sub nom. Cementos Guadalajara, S.A. et al.* v. *United States,* No. 86–12–01525, and *Cementos Anahuac del Golfo, S.A.* v. *United States,* No. 86–12–01607,[1] in which similar applications were presented.

I

The defendants vigorously contest the application(s). They argue, for example, that it is

> well established that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. A lower court cannot vary the mandate or give any further relief. A mandate must be interpreted in accordance with the context of the proceedings. A lower court can only consider and decide matters of record before the appellate court, and the law of the case, as decided by the appellate court, "comprehends things decided by necessary implication as well as those decided explicitly."[2]

A shown in defendants' memorandum, there is ample precedent to support each of these points. The "hope" of this law, as indicated, for example, by the court in *Litman* v. *Massachusetts Mutual Life Insurance Co.,* 825 F.3d 1506, 1512 (11th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988), is "finality". That goal was achieved upon entry of the final judgments in the cases before Judge Carman and their subsequent affirmance on appeal.

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[1]Final judgments entered in those cases were affirmed by the court of appeals in the same decision reversing this court's remand order and reported at 879 F.2d 847. Since then, the timing, but not the status, of those cases has been the same as the case at bar. *See generally Cementos Guadalajara, S.A.* v. *United States,* 13 CIT ——, Slip Op. 89–163 (Nov. 22, 1989), which denied the applications for injunctive relief submitted therein.

[2]Defendants' Supplemental Memorandum, pp. 12–13, footnotes omitted save that part of footnote number 11 which quotes *Litman* v. *Massachusetts Mutual Life Insurance Co.,* 825 F.2d 1506, 1511–12 (11th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988), as follows:

> The mandate rule is simply an application of the law of the case doctrine to a specific set of facts * * *. Each tier in the judicial hierarchy has its responsibility once a mandate is issued.
>
> * * * * * * *
>
> When an appellate court issues a specific mandate it is not subject to interpretation; the district court has an obligation to carry out the order. A different result would encourage and invite district courts to engage in *ad hoc* analysis of the propriety of appellate court rulings. Post mandate maneuvering in the district courts would undermine the authority of appellate courts and create a great deal of uncertainty in the judicial process. It would also eliminate any hope of finality.

In this case, on the other hand, the defendants appealed from the remand order, which was interlocutory. The decision of that appeal necessarily led to return of the case to the jurisdiction of this court upon issuance of the circuit mandate. Hence, the court is seized not only with the authority and the obligation to implement in an orderly manner the judgement of the court of appeals as it pertains to this court's interlocutory order, but also to grant such other and further relief as justice may require. *Cf. Cementos Guadalajara, S.A.* v. *United States, supra* note 1. Indeed, in this case, the defendants had agreed to suspension of liquidation, which was granted on October 21, 1987, and the effect of the subsequent remand order has been to continue the suspension,[3] pending ITA reconsideration of its first administrative review or pursuit of any appeal.

II

The government has often consented to suspension of liquidation of entries covered by actions seeking judicial review of ITA determinations made pursuant to 19 U.S.C. § 1675 since the decision in *Zenith Radio Corporation* v. *United States,* 710 F.2d 806, 810 (Fed. Cir. 1983), which concluded that, in a case like the one at bar, "the consequences of liquidation to constitute irreparable injury" in the context of obtaining meaningful relief after full exercise of the right to judicial review, including, of course, appeal. In other words, suspension of liquidation can be necessary for the preservation of jurisdiction.

Notwithstanding the government's past acquiesence in suspension in this case, and in others until finally resolved, the defendants now oppose extension of suspension herein. As for the regular requirements for grant of such extraordinary equitable relief, as enumerated, for example, in *S.J. Stile Associates Ltd.* v. *Snyder,* 646 F.2d 522, 525 (CCPA 1981), and *Cambridge Lee Industries, Inc.* v. *United States,* 13 CIT ——, Slip Op. 89–156, at 3 (Nov. 1, 1989), cash apparently has been deposited with the government on behalf of the plaintiff to cover any countervailing duties that may be owed on the entries in question. This fact diminishes defendants' ability to show a balance of hardship in their favor—particularly in the face of the irrevocable act that essentially is liquidation. The existence of the deposit(s) also implies protection of the public interest. Moreover, as was pointed out in slip op. 88–58, "the overriding concern this case touches upon is continuation and enhancement of long-standing, friendly relations between the United States of America and of Mexico." 12 CIT at ——, 687 F. Supp. at 1561. Surely, this being the concern, it is in the public interest to permit the plaintiff a full and fair opportunity to present its position to this country's court of last resort. And, as the Federal Circuit recognized in its *Zenith* decision, *supra,* to permit liquidation to be carried out before an appeal with

[3]At the hearing, defendants' counsel agreed that this long-standing injunction remains in full force and effect. *See* transcript, pp. 44, 58.

potential impact thereon has run its course can leave a successful appellant with a Pyrrhic victory, a court judgment of little moment. In short, the present facts and circumstances of this case clearly support plaintiff's position on these traditional counts, and this and other courts have held that the remaining requisite showing of likelihood of success on the merits is in "inverse proportion to the severity of the injury the moving party will sustain without injunctive relief." *Smith Corona Corporation* v. *United States,* 11 CIT ——, ——, 678 F. Supp. 285, 293 (1987). *See, e.g., Ceramica Regiomontana, S.A.* v. *United States,* 7 CIT 390, 395, 590 F. Supp. 1260, 1264 (1984); *American Air Parcel Forwarding Company* v. *United States,* 1 CIT 293, 300, 515 F. Supp. 47, 53 (1981).

The merits here are of notable consequence. Whether a nation which becomes a "country under the Agreement" within the meaning of 19 U.S.C. § 1671(b) is then entitled to an injury determination by the International Trade Commission pursuant to section 1671(a) even as to pre-existing, unliquidated entries before countervailing (or antidumping) duties can be imposed on them is one of the most important issues to confront this Court of International Trade and the Federal Circuit since passage of the Trade Agreements Act of 1979.

The defendants argue that the merits are whether or not the Supreme Court would grant plaintiff's projected petition for a writ. They quote the decision of then Justice Rehnquist, sitting as Circuit Justice, in *Houchins* v. *KQED, Inc.,* 429 U.S. 1341, 1345 (1977), that "the threshold barrier confronting all stay applications [is] reasonable likelihood that the petition for certiorari will be granted" and also Circuit Justice Marshall's analogous opinion in *Brennan* v. *United States Postal Service,* 439 U.S. 1345 (1978), that the

> well-established criteria for granting a stay are "that the applicants must show 'a balance of hardships in their favor' *and* that the issue is so substantial that four Justices of this Court would likely vote to grant a writ of certiorari."

439 U.S. at 1346 (emphasis in original), *quoting New York Times Co.* v. *Jascalevich,* 439 U.S. 1331, 1337 (1978). If this is the immediate issue, of course this court is not competent to opine as to whether or not the requisite number of justices would vote to place plaintiff's issue on their crowded docket for plenary review. All that this court can state is that that substantive issue is anything but frivolous. Obviously, if it were of no import, the court would have no difficulty denying now plaintiff's application, notwithstanding the satisfaction of the other prerequisites for grant thereof.

III

Applications like the one at bar seek to preserve the status quo. In this case, that status has included suspension of liquidation—since the defendants first agreed thereto more than two years

ago. As for the present and the immediate future, the 90-day period prescribed by 28 U.S.C. § 2101(c) and Supreme Court Rule 20.2 for filing of a petition for certiorari in a case such as this is well along. Upon receipt of a petition, a party desiring to respond may do so within 30 days. Sup.Ct. Rule 22.1. At that time, the papers "will be distributed by the Clerk to the Court for its consideration". *Id.* at 22.4. History teaches that the

> Court usually takes up the case at the Friday conference about two weeks later. The Court announces its ruling on petitions on the Monday following the conference at which they are discussed by the Justices, unless consideration of a petition is deferred to the following conference. The Clerk promptly notifies counsel for the parties by mail.[4]

Hence, the time is growing short for disposition of any writ petition by the plaintiff to occur. And, if granted, history also indicates that the case would be heard and decided in an expeditious manner.

Nevertheless, the defendants argue that,

> if plaintiff desired to obtain a stay pending its application for a writ of certiorari, it was obligated to proceed, pursuant to Rule 41 of the Federal Rules of Appellate Procedure and Supreme Court Rule 44, to apply for a stay in the Court of Appeals for the Federal Circuit or in the Supreme Court. If plaintiff lost the opportunity to seek a stay from the appellate court, it did so through its own fault. In any event, plaintiff still has the opportunity to seek a stay from a Justice of the Supreme Court pursuant to Supreme Court Rule 44. It should not be permitted to circumvent the Federal Rules of Appellate Procedure and the Rules of the Supreme Court by its present "motion to extend injunction."[5]

This position has obvious merit, although Federal Rule of Appellate Procedure 8(a), itself, states:

> Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal *must ordinarily be made in the first instance in the district court.* [emphasis added]

In a similar vein, Supreme Court Rule 44.4 provides:

> An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, *unless application for the relief sought first has been made to the appropriate court below, or to a judge or judges thereof.* [emphasis added]

Plaintiff's is just such an application, and Circuit Justice Rehnquist has pointed out:

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[4]Stern, Gressman & Shapiro, Supreme Court Practice, p. 398 (6th ed. 1986) (footnote omitted).

[5]Defendants' Memorandum in Opposition to Plaintiff's "Motion to Extend Injunction", p. 11 (footnotes omitted).

> * * * Whatever the current application of the so-called jurisdictional shift theory to modern appellate procedure, it is well settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, even to this Court.

Hawaii Housing Authority v. *Midkiff,* 463 U.S. 1323, 1324 (1983), *citing Newton* v. *Consolidated Gas Co.,* 258 U.S. 165, 177 (1922); *Merrimack River Savings Bank* v. *Clay Center,* 219 U.S. 527, 531–35 (1911); and Federal Rule of Civil Procedure 62.

Of course, it is equally well settled that an unsuccessful party on appeal should seek a stay from the court of appeals of its mandate pending any review on certiorari. The record here reveals that the plaintiff-appellee sought, and did obtain, such relief in regard to its suggested rehearing *en banc,* but that it has failed to seek any further stay from that forum once the suggestion had been declined.[6] In any event, by that time the plaintiff-appellee had had more than 90 days to contemplate the three-judge panel's decision on July 13, 1989. In this setting, it is appropriate to repeat the conclusion reached in *Cementos Guadalajara, S.A.* v. *United States,* 13 CIT at ——, Slip Op. 89–163 at 13–14, to wit:

> * * * [A]ny hardship the decision of this Court bestows upon the plaintiffs in this case results from plaintiffs' own acts. While before the Federal Circuit plaintiffs availed themselves of Fed. R. App. P. 41(a) to obtain a stay of the issuance of the mandate pending their applications for a rehearing or en banc review. It would have been appropriate at that time to seek relief in the form of a stay pending review on certiorari under Fed. R. App. P. 41(b). Plaintiffs have advanced no reasons to this Court why they could not have petitioned the Federal Circuit for the stay. Even after the Appeals Court decision and the issuance of the mandate, plaintiffs still had the opportunity to petition for recall of the mandate upon a showing of good cause. *See e.g., Johnson* v. *Bechtel Assocs. Professional Corp.,* 801 F.2d 412, 416 (D.C. Cir. 1986) (and citation therein at notes 19 and 20). Additionally, after the issuance of this memorandum and order, it would appear that plaintiffs are not precluded from obtaining relief in superior courts. [footnote omitted]

Although the status quo of this case is different from that in *Guadalajara,* including the fact that the injunction suspending liquidation is still in full force and effect, the clear implication of the mandate of the Federal Circuit is that the injunction be vacated and the case dismissed. Equally clear is the court's obligation to carry out that mandate in an orderly manner. Thus, this court is unable to conclude that it is at liberty to extend, without the concurrence of a higher court, the injunction for the entire length of time the plaintiff presumably requires to obtain a writ of certiorari from the Supreme Court.

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[6] At the hearing, the parties stipulated that the plaintiff first had notice of the declination on October 23, 1989.

On the other hand, on November 15, 1989 this court was empowered to and did grant, in an exercise of caution, plaintiff's application for a temporary restraining order, pending the hearing. The parties' able presentations at the hearing convinced the court that that order was unnecessary in this case, but the CIT Rule 65(b) provision that the court has authority to extend temporary restraints for a second 10-day period "for good cause shown" on the record is still a useful guide on the question of length of time. Since such good cause is shown, as discussed hereinabove, it is

ORDERED that plaintiff's Motion to Extend Injunction be, and it hereby is, granted to the extent that the court's order dated May 12, 1988 and issued in conjunction with slip op. 88–58, 12 CIT ——, 687 F. Supp. 1558 will remain in full force and effect until the close of business on December 4, 1989, after which date this court will vacate the injunction, unless ordered otherwise by another court; in all other respects, plaintiff's motion is denied.

(Slip Op. 89–165)

ASAHI CHEMICAL INDUSTRY CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–5–00755–S

[The defendant's motion for a rehearing is granted, and the action is dismissed on the ground of mootness.]

(Decided December 6, 1989)

Barnes, Richardson & Colburn (*James S. O'Kelly* and *Leonard Lehman*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Tina M. Stikas*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

MEMORANDUM OPINION

TSOUCALAS, *Judge:* The defendant United States moves, pursuant to Rules 1, 59, and 60 of the Rules of this Court, for a rehearing of the opinion and remand order issued in *Asahi Chemical Indus. Co. v. United States,* 12 CIT ——, 692 F. Supp. 1376 (1988). Defendant seeks dismissal of this case in its entirety for lack of jurisdiction or, alternatively, vacatur of that portion of *Asahi Chemical* pertaining to the standing issue. Two main questions are raised: (1) whether revocation of an antidumping duty order by the Department of Commerce, International Trade Administration (Commerce), during the pendency of judicial consideration of the order renders the case moot; and (2) whether the court erroneously decided that plaintiff's grievance is against the antidumping duty order published by Commerce, rather than against the dumping determination of the Secre-

tary of the Treasury which the plaintiff lacked standing to contest under the applicable law. The defendant's motion for a rehearing is granted on the ground that the revocation determination of Commerce rendered this case moot; therefore, the Court does not discern the necessity of analyzing the alternative standing issue.

BACKGROUND

Plaintiff is a Japanese exporter/manufacturer of spun acrylic yarn (SAY). On October 25, 1979, the Treasury Department (the administrative arm of the United States antidumping laws until the promulgation of the Trade Agreements Act of 1979 on January 1, 1980) published a notice of its determination that SAY from Japan was being sold at less then fair value (LTFV). 44 Fed. Reg. 61,492. The weighted-average dumping margin for the plaintiff was found to be 29.05%. *Id.* at 61,493.

In a separate investigation, the United States International Trade Commission (ITC) examined certain data to determine whether an industry in the United States was being, or was likely to be, injured, or was prevented from being established, by reason of LTFV sales of SAY from Japan. The ITC had yet to publish the final results of its investigation when the Trade Agreements Act of 1979 became effective. Consequently, the ITC terminated its pending investigation of SAY from Japan and initiated a new injury investigation pursuant to 19 U.S.C. § 1673d. 45 Fed. Reg. 3403 (Jan. 17, 1980). On March 26, 1980, the ITC published its final determination of material injury with regard to SAY from Japan. 45 Fed. Reg. 19,682.

On April 9, 1980, Commerce published an antidumping duty order, consisting of the ITC's material injury determination and the Treasury's final LTFV determination. 45 Fed. Reg. 24,127. Accordingly, "[a]ll unappraised entries of [SAY from Japan] made on and after July 13, 1979, the date on which liquidation was suspended, [became] liable for the possible assessment of antidumping duties. Deposits of estimated antidumping duties [were] required of all entries made on and after [April 9, 1980]." *Id.*

Plaintiff timely filed the instant action in this Court challenging the affirmative determinations of both the Treasury and the ITC. During the pendency of litigation, plaintiff requested Commerce to revoke the subject antidumping duty order as it applies to the plaintiff. Thereafter, Commerce conducted an administrative review and published, on November 16, 1987, its final determination to revoke the order's applicability to the plaintiff. 52 Fed. Reg. 43,781. In the notice, Commerce stated that "there were no shipments of [SAY] to the United States by [Asahi] during the period April 1, 1985 through [July 31, 1986]." *Id.*

A decision on this case, *Asahi Chemical Indus. Co.* v. *United States*, 12 CIT——, 692 F. Supp. 1376 (1988), was published on July 25, 1988, remanding the case to Commerce with instructions to recalculate certain prices. The court also disagreed with certain mate-

rial injury findings made by the ITC but did not issue a concurrent remand to the ITC. The court stated that if the results of Commerce's reassessment of certain prices, as directed in the remand, sustain the affirmative LTFV determination, then "the Court directs the ITC to re-examine its data with regard to injury based on Japanese imports alone during the period of investigation." *Id.* at ——, 692 F. Supp. at 1381.

Commerce did not conduct the remand as ordered by the court; the defendant filed the instant motion for a rehearing.

DISCUSSION

The litigants agree that the facts warranted revocation pursuant to 19 C.F.R. § 353.54.[1] The divided positions of the parties relate to the question whether such an administrative revocation nullifies the antidumping duty order to the extent that it renders the pending judicial action moot. The source of this dispute is in the interpretation of 19 C.F.R. § 353.54(e), which states that before revocation:

> * * * the parties who are subject to the revocation * * * must agree in writing to an immediate suspension of liquidation and *reinstatement of the Finding or Order* or continuation of the investigation, as appropriate, *if circumstances develop which indicate that the merchandise thereafter imported into the United States is being sold at less than fair value.* (Emphasis added).

The regulation indicates that the revoked order may be reinstated. Plaintiff argues that this impels a conclusion that the revocation determination is, by its very nature, conditional and therefore does not render moot the issues raised in this case. A corollary to this is that an antidumping duty order may be definitively expunged only through judicial action.

Defendant rebuts that the case does not pose any controversy because, by virtue of the revocation determination of Commerce, plaintiff received the relief that it was seeking in this Court, i.e., shipments of plaintiff's SAY are no longer subject to the imposition of any antidumping duties. Regarding the clause in the regulation pertaining to reinstatement of a revoked order, defendant contends that any pronouncement by the Court would be inappropriate because reinstatement has not occurred.

The Court cannot agree with the plaintiff's construction of the regulation nor adopt the defendant's position on the import of the reinstatement provision. In the Court's opinion, the revocation determination of Commerce quashes the effect of an antidumping duty order, notwithstanding the language in the regulation implying

[1]The regulation governing revocation provides that Commerce may "revoke or terminate, in whole or in part," an antidumping duty order if the merchandise subject to the order is "no longer being [sold] at less than fair value * * * and [if] there is no likelihood of resumption of sales [of the covered merchandise] at less than fair value." 19 C.F.R. § 353.54(a). Commerce concluded that revocation was proper because plaintiff had not exported to the United States any SAY from Japan for over four years. 52 Fed. Reg. 43,781 (Nov. 16, 1987). Additionally, Commerce was satisfied "that there is no likelihood of resumption of sales at less than fair value by [the plaintiff]." *Id.* at 43,782.

that the revoked order may be reinstated. The law does not permit reinstatement of a revoked order in the manner envisioned by the regulation. Imposition of antidumping duties must have the support of two affirmative findings: a finding of dumping by Commerce and a separate finding by the ITC that this dumping materially injures the domestic industry. *See* 19 U.S.C. §§ 1671–1677g. The regulation, however, indicates that Commerce has the authority to reinstate an order it has previously revoked, if the covered merchandise is dumped anew. It is an impermissible proposition that Commerce will impose antidumping duties based on a finding of dumping alone, without the requisite additional injury finding by the ITC.

The regulatory provision for reinstatement of a revoked order presents other problems. 19 U.S.C. § 1675(c) authorizes Commerce to "revoke, in whole or in part, a countervailing duty order or an antidumping duty order," but does not specify whether such revoked order may be reinstated. On the other hand, the conclusion that a revoked order may not be administratively reinstated finds support in legislative history. "The term 'proceeding' [as in an antidumping duty proceeding] applies to that activity which begins when a petition is filed * * * and ends upon the final disposition of the case, up to revocation of an antidumping duty order, if any, * * * as the case may be." S. Rep. No. 96–249, 96th Cong., 1st Sess. 62 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 448. This corresponds with the statutory scheme which provides only one means for imposing antidumping duties: investigations pursuant to 19 U.S.C. §§ 1671–1677g. Therefore, once Commerce makes a revocation determination, the antidumping duty order ceases to be operative and may not be reinstated pursuant to 19 C.F.R. § 353.54.

An exception exists when the revocation determination itself becomes the subject of judicial review. If reversed by the Court, then the revocation determination must be rescinded, and the revoked order must be reinstated. *See NTN Bearing Corp. of America* v. *United States*, 13 CIT ——, 705 F. Supp. 594 (1989), *appeal docketed*, No. 89–1452 (Fed. Cir. May 12, 1989). In the instant case, the revocation determination of Commerce as to the merchandise exported by Asahi was not challenged in this Court.

The Court fails to discern the logic in defendant's argument that the Court must resolve the question of finality of a revocation determination without addressing the issue of whether a revoked order may be reinstated. Defendant claims that the matter of reinstatement is outside the perimeter of this case because "to date, there has never been an attempt to enforce a promise not to dump in the future." Transcript of Oral Argument at 6. In fact, the defendant is even averse to acknowledging that revocation voids an antidumping order. To the question of whether revocation definitively invalidates an outstanding order, defendant merely states that "Commerce essentially treats orders which it has revoked as no longer in existence." *Id.* at 4. At the Court repeatedly pointed out during the oral

argument, these equivocal statements obscure the interdependent nature of the provisions for revocation and reinstatement under 19 C.F.R. § 353.54. Commerce either does, or does not, consider revoked orders to be final for purposes of affecting antidumping duties. If Commerce regards revocation determination to be final, then the instant case is moot, and there cannot be any reinstatement pursuant to 19 C.F.R. § 353.54. Conversely, if Commerce insists that it retains residual authority to reinstate a revoked order in the future, then the instant case cannot be declared moot because revocation determination is not final. Therefore, it is incongruous for the defendant to claim that a revocation determination by Commerce demands dismissal of this case, while asserting at the same time that it is improper for the Court to pass judgment on the reinstatement provision of the regulation.

While the defendant failed to provide the Court with some persuasive arguments justifying the problematic reinstatement provision, the Court perceives its obvious purpose: discourage resumption of dumping immediately after revocation. With the threat of such abuse of revocation, there are some policy concerns about having to undertake an entirely new investigation. On the other hand, however, the provision is so ambiguous as to make the standard of reinstatement conjectural. The provision does not specify the circumstances under which Commerce will consider reinstatement, nor the type of investigation which will precede reinstatement. The provision also is silent regarding the inter-relationship between reinstatement and the existing statutory framework for imposing duties. The Court cannot affirm the reinstatement provision under 19 C.F.R. § 353.54, because it does not assure a reasonable degree of certainty to the interested parties whose conduct it purports to regulate. Whether or not reinstatement may be accomplished through an amendment to 19 C.F.R. § 353.54, or through a new provision, should be the subject of another case.

The foregoing analysis disposes of other contentions arising under 19 C.F.R. § 353.54. Plaintiff theorizes, for instance, that injury determination of the ITC is immune from the revocation determination of Commerce because under our trade laws, Commerce makes only the LTFV findings; the ITC is entrusted with making the material injury determinations. Therefore, plaintiff claims that the ITC retains the exclusive authority to revoke the injury component of an antidumping duty order. This argument is unsound because 19 U.S.C. § 1675(c) empowers *Commerce* to "revoke, in whole or in part, a countervailing duty order or an antidumping duty *order*." (Emphasis added). That an order consists of an affirmative LTFV determination as well as an affirmative *material injury* determination, hardly needs recitation.[2]

[2]In this connection, the Court does not need to resolve whether the instant case is analogous to *Canadian Meat Council* v. *United States*, 12 CIT——, 680 F. Supp. 390 (1988), or to *Internor Trade, Inc.* v. *United States*, 10 CIT 826, 651 F. Supp. 1456 (1986), because these cases are potentially relevant only if the revocation determination of Commerce has no effect on the injury determination of the ITC.

CONCLUSION

The court determines that a revocation determination of Commerce pursuant to 19 C.F.R. § 353.54, which is not timely challenged in this Court, voids an antidumping duty order and therefore renders the instant case moot. Therefore, the defendant's motion for a rehearing is granted, and the action is dismissed.

(Slip Op. 89–166)

ST. REGIS PAPER CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–06–00848

ON PLAINTIFF'S MOTION FOR REHEARING

Plaintiff, pursuant to Rule 59(a) of the rules of this court, moves for a rehearing of an order of this court which granted defendant's motion to sever and dismiss seventeen of the nineteen original entries in this action, because liquidation of the entries was not timely protested. Plaintiff contends that the Customs Service, in violation of Customs Regulation 159.9, failed to post "notice of liquidation * * * in a conspicuous place in the customhouse at the port of entry * * *."

Held: Since plaintiff did not satisfy the requirements for the granting of a rehearing, plaintiff's motion is denied.

[Plaintiff's motion denied.]

(Dated December 11, 1989)

Herrick & Larsen (Herbert Peter Larsen on the motion), for plaintiff.

Stuart D. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Barbara M. Epstein* on the motion), for defendant.

RE, *Chief Judge:* Plaintiff, pursuant to Rule 59(a) of the rules of this court, has moved for a rehearing of this court's order of June 21, 1989, granting defendant's motion to sever and dismiss seventeen of the nineteen entries originally in this case. The entries consist of certain photographic paper imported at the Port of Dayton, Ohio, and liquidated at various times between 1979 and 1982.

The imported paper was classified by the Customs Service as paper, "not specially provided for," under item 252.90, TSUS. Plaintiff protested the classification and contended that the imported paper should be classified as "[b]asic paper to be sensitized for use in photography," under item 252.05, TSUS. The protest was denied, and plaintiff filed a complaint commencing the action. In lieu of answering plaintiff's complaint, defendant moved to sever and dismiss seventeen of the nineteen entries, contending that "seventeen * * * entries, covered by two * * * protests, are not properly the subject of this Court's jurisdiction due to plaintiff's failure to timely file a protest within 90 days of notice of the liquidation of those entries." Upon consideration of defendant's motion and plaintiff's motion to

strike, which was submitted in response to defendant's motion, this court granted defendant's motion to sever and dismiss.

By the present motion, plaintiff seeks to have the court rehear defendant's motion to sever and dismiss. Plaintiff contends that "defendant's motion to dismiss * * * was granted without defendant having answered [the complaint], or plaintiff having the opportunity to be heard regarding the jurisdictional issue which is the core of the complaint." Plaintiff asserts that the Customs Service, in violation of Customs Regulation 159.9(b), did not post "notice of liquidation * * * in a conspicuous place in the customhouse at the port of entry * * *." 19 C.F.R. § 159.9(b) (1988).

After a thorough consideration of plaintiff's motion the court holds that plaintiff has not satisfied the requirements for the granting of a rehearing. Since plaintiff has failed to demonstrate any grounds that would justify the granting of its motion, plaintiff's motion for rehearing is denied.

It is clear "that the decision to grant or deny a motion for a rehearing lies within the sound discretion of the court." *Channel Master, Div. of Avnet, Inc.* v. *United States*, 11 CIT 876, 877, 674 F. Supp. 872, 873 (1987), *aff'd*, 856 F.2d 177 (Fed. Cir. 1988). *See also ILWU Local 142* v. *Donovan*, 10 CIT 161, 162 (1986); *Oak Laminates* v. *United States*, 8 CIT 300, 302, 601 F. Supp. 1031, 1033 (1984), *aff'd*, 783 F.2d 195 (Fed. Cir. 1986). In addition, Rule 59(a)(2) of the rules of this court provides that a rehearing may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." USCIT R. 59(a)(2).

In *W. J. Byrnes & Co.* v. *United States*, 68 Cust. Ct. 358, C.R.D. 72–5 (1972), the Customs Court set forth the appropriate grounds for the granting of a rehearing of a trial:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

Id. at 358. Similarly, in deciding on a motion to rehear an order, the court must consider whether the movant is entitled to a rehearing under the principles of equity law. *See* USCIT. R. 59(a)(2).

In the present case, in lieu of an answer to plaintiff's complaint, defendant responded with its motion to sever and dismiss seventeen of the nineteen entries, alleging lack of subject matter jurisdiction. *See* USCIT R. 12(b)(1). Plaintiff responded with a motion to strike defendant's motion, and to compel defendant to answer the complaint. In its motion, plaintiff asserted "that the request by defen-

dant for a partial disposition of this case prior to its service of Answer is premature and improper under the Rules of this Court." It is clear, however, that under Rule 12(b)(1) of the rules of this court, a party may make a motion for lack of subject matter jurisdiction even before answering the complaint. *See* USCIT R. 12(b)(1). Plaintiff's motion to strike was denied by order dated May 31, 1989, and defendant's motion to sever and dismiss was granted by order dated June 21, 1989.

In its present motion, plaintiff states that it "has now prepared an opposition to defendant's motion setting forth its position on the questions of fact and law involved." Plaintiff has neither asserted nor shown, however, that it could not have presented the same argument in response to defendant's motion to sever and dismiss. The events alleged by plaintiff, in the papers accompanying its motion, pertained to the condition of the Customs area at the Port of Dayton from 1979 to 1982. Indeed, in its complaint, plaintiff alleged that "[a]t the Port of Dayton, Ohio, during all relevant times, bulletin notices of liquidation were unable to be found in a conspicuous place in the Customhouse as prescribed by law."

Moreover, the allegations raised by plaintiff are without merit. According to statute, protests of classification decisions by Customs "shall be filed with [the appropriate] customs officer within ninety days after but not before * * * notice of liquidation or reliquidation * * *." 19 U.S.C. § 1514(c)(2) (1988). Section 159.9(b) of the Customs Regulations requires that:

> [t]he bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry (or Customs station, when the entries listed were filed at a Customs station outside the limits of a port of entry), or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.

19 C.F.R. § 159.9(b) (1988).

In *Goldhofer Fahrzeugwerk GmbH & Co.* v. *United States*, 885 F.2d 858 (Fed. Cir. 1989), the Court of Appeals for the Federal Circuit affirmed a decision of this court, *Goldhofer Fahrzeugwerk GmbH & Co.* v. *United States*, 13 CIT——, 706 F. Supp. 892 (1989), which upheld the constitutionality of Customs Regulations 159.9. The appellate court held that, under the facts of *Goldhofer*, the "posting of bulletin notice of liquidation in the customhouse at the port of entry alone was a certain to ensure actual notice of liquidation to the importer of record or its local Customs broker as mail notice and, therefore, mail notice was not constitutionally required." 885 F.2d at 863.

In the present case, it is not disputed that, for the seventeen entries at issue in this motion, plaintiff's protest was filed after the 90-day period established by statute. Plaintiff asserts, nevertheless, that "[t]he form and manner in which the Port of Dayton posted bulletin notices of entry during all relevant times was not in compliance with [Customs Regulation 159.9(b)] * * *." Hence, plaintiff contends that "[a]s the Customs Service stands in violation of its own regulation regarding notice, no legal liquidation of these entries occurred on the dates purported by defendant and plaintiff is not barred from seeking the return of overpaid * * * duties * * *."

In *Frederick Wholesale Corp.* v. *United States*, 6 CIT 306, 585 F. Supp. 640 (1983), *aff'd* 754 F.2d 349 (Fed. Cir. 1985), the defendant moved to dismiss plaintiff's protest of the classification of certain imported merchandise, contending that the "court lacks jurisdiction because no timely protest was filed * * *." 6 CIT at 307, 585 F. Supp. at 641. The Court of International Trade held that the bulletin notices were "posted * * * in a conspicuous place in the customhouse," for the purposes of Customs Regulation 159.9(b). *See* 6 CIT at 310, 585 F. Supp. at 648. On appeal to the Court of Appeals for the Federal Circuit, plaintiff alleged "that the lower court erroneously concluded that the bulletin notice of liquidation was posted in a 'conspicuous place.'" *Frederick Wholesale*, 754 F.2d at 351. According to the plaintiff, Customs' actions were in violation of Customs Regulation 159.9(b).

In *Frederick Wholesale*, the bulletin notices of liquidation were filed in binders located in a third floor room of an eight floor customhouse in New York. The binders "were open, visible, and accessible to one who was in that room. However, there was no sign anywhere in the Customhouse advising the public that the bulletin notices were maintained [there]." 754 F.2d at 350. Nevertheless, the Court of Appeals for the Federal Circuit held that the bulletin notices were "in a conspicuous place" for purposes of Customs Regulations 159.9(b). The court observed that:

> [a] prudent importer or other interested person exercising a reasonable amount of diligence would have been directed to the proper room by consulting the Customs Information Office located on the plaza level in conjunction with, if necessary, the offices of the Regional Commissioner of Customs or the Area Director of the New York Seaport Area, which are also located in the Customhouse. We refuse to apply a wooden construction to the term "conspicuous" as urged by appellant.

Id. at 352.

The appellate court in *Frederick Wholesale* also held "that the second method of giving notice under 19 C.F.R. § 159.9(b) was satisfied[,]" since "[t]he bulletin notices could readily be located and consulted by all interested persons who, exercising ordinary prudence, would be directed to their location by a 'notice' maintained in a conspicuous place." *Id.* The court explained that "[t]he information of-

fice, in conjunction with, if necessary, officials at the Customhouse, would be that 'notice.' " *Id.*

In the present case, in support of its contentions, plaintiff submitted the affidavit of Mr. Kevin T. Hannon, a licensed customhouse broker who is familiar with the Customs office at the Port of Dayton. In his affidavit, Mr. Hannon described the Customs office and the location of the bulletin notices of liquidation. He stated that in the Customs area there is an unmarked glass door to a room which "contains some desks and file cabinets and appears to be a work station." Mr. Hannon stated that "[t]he bulletin notices of liquidation are kept on a clipboard which usually resides on top of some file cabinets at the rear of this office." He also noted that "[t]here is at least one other clipboard kept in approximately the same location, and there are usually other papers piled or strewn on the top of the same set of cabinets." According to Mr. Hannon, "there is no sign or other device which would enable a visitor to ascertain the location of the bulletin notices."

As the Court of Appeals for the Federal Circuit noted in *Frederick Wholesale*, when bulletin notices of liquidation are not plainly visible, "[a] prudent importer or other interested person exercising a reasonable amount of diligence would have been directed to the proper room by consulting the Customs [employees on duty in the customhouse] * * *." 754 F.2d at 352. Mr. Hannon's affidavit indicates that the bulletin notices of liquidation were not plainly visible to persons unfamiliar with the Customs area. Nonetheless, plaintiff neither alleges nor proves that Customs employees were not available to assist persons in locating the bulletin notices of liquidation. Hence, it is clear that plaintiff in this case has not acted with "a reasonable amount of diligence."

Moreover, attached to defendant's motion to dismiss and sever was a declaration of Mr. Michael E. Murphy, who was Port Director of Customs at the Port of Dayton from 1977 to 1986. Mr. Murphy stated that the room containing the bulletin notices of liquidation was Customs' "main office" at the Port of Dayton. He explained that "[a]ll Customs business except passenger and baggage processing was transacted in this main office, and the office was always open to the public during business hours." Mr. Murphy stated that "[i]t was my policy as port director that at least one of the five Customs employees was required to be on duty in [the main office] during business hours."

In view of the foregoing, it is the determination of the court that plaintiff has not satisfied the requirements for the granting of a rehearing. Accordingly, plaintiff's motion for rehearing is denied.

(Slip Op. 89–167)

SUPERSCOPE, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–03–00328

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The Customs Service classified certain imported unassembled cabinets, which contained glass panels manufactured in the United States, as "[f]urniture, and parts thereof, not specially provided for: * * * [o]f wood," under item 727.35, TSUS, or as "[f]urniture, and parts thereof, not specially provided for: * * * [o]ther," under item 727.55, TSUS, depending upon whether the merchandise is in "chief value" of glass or of wood. Plaintiff contends that the glass panels included in the unassembled cabinets were improperly denied American goods returned treatment under either item 800.00, TSUS, or item 807.00, TSUS. Plaintiff also contests the classification of three models of the unassembled cabinets under item 727.55, TSUS, and contends that they are properly classifiable under item 727.35, TSUS. Plaintiff moves for summary judgment. Defendant opposes the motion and cross moves for summary judgment.

Held: As to the treatment of the glass panels as American goods returned, the court concludes that there are no genuine issues of material fact. Since the glass panels were not "advanced in value or improved in condition * * * while abroad," but were merely repacked, they are entitled to duty free entry under item 800.00, TSUS. As to the proper classification of three models of the unassembled cabinets, since plaintiff withdrew its claim at oral argument, no determination need be made.

[Plaintiff's motion for summary judgment granted in part.]

(Dated December 11, 1989)

Stein Shostak Shostak & O'Hara (*S. Richard Shostak* and *Robert Glenn White*, on the motion), for plaintiff.

Stuart D. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*James A. Curley*, on the motion), for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of five models of certain unassembled cabinets, imported from New Zealand from 1980 to 1982. The imported cabinets, which entered at the Port of Los Angeles, California, contain glass panels which are manufactured in the United States and serve as doors or lids.

Models RM 5000 and RM 6000 of the imported merchandise were classified by the Customs Service as "[f]urniture, and parts thereof, not specially provided for: * * * [o]f wood," under item 727.35 of the Tariff Schedules of the United States (TSUS). Models RM 3060D, RM 5100, and RM 5400 were classified as "[f]urniture, and parts thereof, not specially provided for: * * * [o]ther," under item 727.55, TSUS. Duty was assessed at the rates respectively provided for in the respective tariff items at the time of entry.

In appraising and liquidating the merchandise, no allowance was made, under either item 800.00, TSUS, or item 807.00, TSUS, for the glass panels manufactured in the United States and imported as part of the unassembled cabinets.

Plaintiff claims that the glass panels packaged as part of the unassembled cabinets were improperly denied American goods returned treatment under either item 800.00, TSUS, or item 807.00,

TSUS. If properly classifiable under item 800.00, TSUS, as maintained by plaintiff, the glass panels are entitled to entry free of duty. If properly classifiable under item 807.00, TSUS, as alternatively maintained by plaintiff, duty would be assessed on the full value of the imported cabinets, less the cost or value of the glass panels. At oral argument, plaintiff stated that "it seems to us that the * * * entire tariff treatment of imported merchandise supports our view that [item] 800[, TSUS,] is the proper place for this merchandise and we certainly would seek that that be our primary claim * * *."

In its moving papers, plaintiff also contested the classification of models RM 3060D, RM 5100, and RM 5400 of the imported cabinets as "[f]urniture, and parts thereof, not specially provided for: * * * [o]ther," under item 727.55, TSUS. Plaintiff contended "that [the] three models of the unassembled cabinets in issue are properly classifiable under item 727.35, TSUS, [since they] are * * * in chief value of wood." During oral argument, however, plaintiff stated that "[a]fter considering this issue and considering the authorities, we've decided to abandon that claim with the Court's permission, so that the issue of whether or not the merchandise * * * should be assessed with duty as an article [in] chief value of glass is no longer in issue." Hence, since this claim has been withdrawn, it is no longer before the court, and no determination need be made.

As to the glass panels, the pertinent statutory provisions of the tariff schedules are as follows:

Classified Under:
Schedule 7, Part 4, Subpart A:

	Furniture, and parts thereof, not specially provided for:	
	* * * * * * *	
	Of wood:	
	* * * * * * *	
	Other:	
	* * * * * * *	
727.35	Furniture other than chairs	4.7% *ad val.* (1980) 4.4% *ad val.* (1981) 4.1% *ad val.* (1982)
	* * * * * * *	
727.55	Other:	9.3% *ad val.* (1980) 8.5% *ad val.* (1981) 7.8% *ad val.* (1982)

Claimed Under:
Schedule 8, Part 1, Subpart A:

800.00	Products of the United States when returned after having been exported, without having been advanced in	

	value or improved in condition by any process of manufacture or other means while abroad.....	Free

Alternatively Claimed Under:
Schedule 8, Part 1, Subpart B:

807.00	Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting....	A duty upon the full value of the imported article, less the cost or value of such products of the United States * * *

The question presented is whether the glass panels, admittedly manufactured in the United States, and packaged as part of the imported unassembled cabinets which were classified as "entireties," should have been granted American goods returned treatment under either item 800.00, TSUS, or item 807.00, TSUS, as maintained by plaintiff.

In order to decide this question the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984). Pursuant to 28 U.S.C. § 2639(a)(1) (1982), the government's classification is presumed to be correct and the burden of proof is upon the party challenging the classification. *See Jarvis Clark Co.*, 733 F.2d at 876.

Plaintiff in this case has previously moved for judgment on the pleadings. This court denied that motion, holding that "all necessary facts have not been admitted, and * * * there remain in dispute material issues of fact." *Superscope, Inc.* v. *United States*, 12 CIT ——, Slip Op. 88–43 at 8 (Mar. 31, 1988). Subsequently, plaintiff issued a "Statement of Material Facts as to Which There Are No Genuine Issues to be Tried." Defendant's response, which admits the truth of most of plaintiff's statements, denies certain statements and sets forth additional statements of fact. Plaintiff has not

responded to defendant's additional statements of fact. Contending that there are no genuine issues of material fact, both parties now move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of International Trade.

Upon examining the pertinent tariff schedules, relevant case law, and supporting papers, the court concludes that there are no genuine issues of material fact, and that, since the glass panels were not "advanced in value or improved in condition * * * while abroad," but were merely repacked, they are entitled to duty free entry under item 800.00, TSUS. Hence, plaintiff's motion for summary judgment on this issue is granted, and defendant's corresponding cross motion is denied.

As to the proper classification of the three models of the imported merchandise, plaintiff withdrew its claim at oral argument. Hence, no determination on this issue need be made.

On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The court may not resolve or try factual issues on a motion for summary judgment; it may only "determine whether there is a genuine issue for trial." *Id.* at 249; *see Yamaha Int'l Corp.* v. *United States*, 3 CIT 108, 109 (1982). In ruling on cross-motions for summary judgment, if no genuine issues of material fact exist, the court must determine whether either party "is entitled to a judgment as a matter of law." USCIT R. 56(d).

The parties agree that "[t]he glass panels were not advanced in value or improved in condition while abroad, except by being packaged with the other components of the cabinet to form new tariff entities, i.e. furniture." The parties also agree that "[n]othing was done to the U.S. glass panels in New Zealand except to repack them with the rest of the unassembled cabinet components."

Plaintiff contends that the glass panels are entitled to duty-free entry as American products "returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad," under item 800.00, TSUS. The parties agree that "[a]ll administrative regulation requirements for entry with benefit of either Item 807.00 or Item 800.00, TSUS, have [been] complied with or waived." The defendant, however, asserts that "[t]he merchandise is not classifiable under item 800.00 because the glass panels were packaged with foreign made merchandise to form unassembled cabinets, which must be classified as an entity."

In support of its position, plaintiff cites cases in which the Customs Court held that American products, returned to the United States after having been repackaged abroad, were nonetheless entitled to, and were granted, duty free entry under item 800.00, TSUS.

In *Border Brokerage Co.* v. *United States*, 65 Cust. Ct. 50, C.D. 4052, 314 F. Supp. 788 (1970), the imported merchandise consisted of tomatoes grown in the United States, exported to Canada "where they were unloaded, unpacked, sorted, graded by color and size, * * * repacked" and returned to the United States. 65 Cust. Ct. at 52, 314 F. Supp. at 790. Plaintiff did not contest the classification, but contended "that the tomatoes [were] entitled to entry free of duty pursuant to item 800.00 of the tariff schedules as returned American products not advanced in value or improved in condition while abroad." *Id.* at 52, 314 F. Supp. at 789.

The *Border Brokerage* court stated "that the test to be applied in item 800.00 cases is whether the merchandise of American origin has itself * * * been the object of advancement in value or improvement in condition while abroad." *Id.* at 55, 314 F. Supp. at 792. The court noted "that nothing more was done to the tomatoes themselves in Canada than that which is entailed in their physical transfer, with selectivity, from one size carton to a carton of a smaller size." *Id.* Hence, the court held that the tomatoes were entitled to duty free entry, under item 800.00, TSUS, because "the involved tomatoes have not been advanced in value or improved in condition while in Canada * * *." *Id.*

In *John V. Carr & Son, Inc.* v. *United States*, 69 Cust. Ct. 78, C.D. 4377, 347 F. Supp. 1390 (1972), *aff'd*, 61 CCPA 52, C.A.D. 1118, 496 F.2d 1225 (1974), the imported merchandise consisted of tin containers with fish hooks of varying sizes. The fish hooks were manufactured in the United States, exported to Hong Kong, where they were packaged, and returned to the United States. Plaintiff did not contest the classification, but "contend[ed] that the value of the fish hooks should have been deducted from the total dutiable value of the merchandise since they [were] entitled to entry free of duty under either [item 800.00 or item 807.00] of the tariff schedules." 69 Cust. Ct. at 80, 347 F. Supp. at 1392.

In *John V. Carr*, the court noted that "nothing whatever was done to the fish hooks which altered them or changed their condition." *Id.* at 92, 347 F. Supp. at 1400. The court held that the fish hooks were entitled to duty free entry, because "absent some alteration or change in the articles themselves, the mere sorting and repacking of goods, even for the purposes of resale to the ultimate consumer, [were] not sufficient to preclude the merchandise from being classified as returned American products under item 800.00 of the tariff schedules." *Id.* at 93, 347 F. Supp at 1400. The Court of Customs and Patent Appeals affirmed, and adopted as its own the opinion of the Customs Court.

In the present case, it is undisputed that the glass panels were not changed or advanced during the time they were abroad. Indeed, defendant admits that "[n]othing was done to the U.S. glass panels in New Zealand except to repack them with the rest of the unassembled cabinet components." Hence, the holdings and reasoning of

Border Brokerage and *John V. Carr*, indicate that the glass panels are entitled to duty free entry under item 800.00, TSUS.

Defendant, however, asserts that "[t]he merchandise is not classifiable under item 800.00 because the glass panels were packaged with foreign made merchandise to form unassembled cabinets, which must be classified as an entity." Defendant argues that "[a]s an entity, the imported merchandise is clearly not a product of the United States." Defendant's strict construction of item 800.00, TSUS, would frustrate what seems to be the fundamental legislative policy embodied in that item. The defendant does not state any policy or principle in support of its strict construction of item 800.00, TSUS. Furthermore, there is no apparent administrative inconvenience or difficulty that would be caused by permitting duty free entry, under item 800.00, TSUS, to American goods returned packaged with or as part of merchandise classified as an "entirety."

Defendant does contend that "plaintiff is attempting to revive the doctrine of constructive segregation * * *." According to defendant, the doctrine of "constructive segregation" "provided that American goods returned to the United States in combination with foreign articles were exempt from duty pursuant to paragraph 1615(a) [of the Tariff Act of 1930, the predecessor statute to item 800.00, TSUS,] if they had not been advanced in value, or improved in condition, and their identity had not been lost by reason of their combination."

The doctrine of "constructive segregation" is illustrated by *Oakville Co.* v. *United States*, 58 Cust. Ct. 79, C.D. 2893 (1967), *modified*, 56 CCPA 1, C.A.D. 943, 402 F.2d 1016 (1968). In *Oakville Co.*, the imported merchandise consisted of pins and tape manufactured in the United States, exported "to Canada where they were packaged in lots of 5,000 pins on a paper tape, wound onto a wooden core forming a wheel-like roll, with two cardboard side discs stapled to the wooden core" and returned to the United States. 58 Cust. Ct. at 79. The merchandise was classified "as common pins under paragraph 350 of the Tariff Act of 1930, as modified * * *." *Id.* at 80. Plaintiff contested the classification of the imported merchandise, and contended that the pins were entitled to duty free entry under paragraph 1615(a) of the Tariff Act of 1930. In addition, "plaintiff further claimed that the wooden spools, paper tape, and cardboard discs constitute the usual and ordinary containers for the imported pins and, as such, were entitled to duty-free entry as the usual containers of duty-free merchandise." *Id.*

The court in *Oakville Co.* noted that "[e]ach and every pin arranged and assembled into the roll of 5,000 is identifiable, and, further, * * * nothing was done to change the pins physically or chemically." *Id.* at 87. The court also observed that "[t]he record states also that the paper tape is oaf American manufacture." *Id.* Hence, the court held that the pins and tape were entitled to duty free entry under paragraph 1615(a). The court, however, denied plaintiff's

claim that the rest of the imported merchandise was entitled to duty free entry. *Id.* at 88.

On appeal, the Court of Customs and Patent Appeals modified the judgment of the Customs Court, but specifically affirmed the determination that the pins and tape were entitled to duty free entry, as American goods returned, under paragraph 1615(a). *See* 56 CCPA at 7, 402 F.2d at 1020. The court, however, noted "that what was imported was a 'different commercial entity' from what was exported from the United States." *Id.* The court held "that the imports, pins-in-rolls, are dutiable as an entity and cannot be split up into their component parts merely because two of those parts are duty-free as American goods returned." *Id.* at 9, 402 F.2d at 1022. Hence, the Court of Customs and Patent Appeals directed Customs to appraise the imported merchandise as pins on rolls under paragraph 350 of the Tariff Act of 1930, with duty assessed at the value of the merchandise less the value, under paragraph 1615(g), of the American goods returned pins and tape.

In support of its contention that the doctrine of "constructive segregation" is no longer valid, defendant cites the Tariff Classification Study of 1960. The Study was made pursuant to section 101(a) of the Customs Simplification Act of 1954, which directed the United States Tariff Commission "to make a complete study of all provisions of the customs laws of the United States[,] * * * [and to] [e]stablish schedules of tariff classifications which will be logical in arrangement and terminology and adapted to the changes which have occurred since 1930 in the character and importance of articles produced in and imported into the United States and in the markets in which they are sold." Customs Simplification Act of 1954, Pub. L. No. 83–768, § 101(a), 68 Stat. 1136, 1136 (1954). The Tariff Classification Study of 1960 "has been resorted to in the construction of the meaning of provisions of the tariff schedules, [but] such recourse is to be taken only in instances where the meaning of the language, as it appears in the tariff schedules, is doubtful or ambiguous, or such a reference is used to corroborate a conclusion reached." *Border Brokerage Co.* v. *United States,* 63 Cust. Ct. 243, 246, C.D. 3903 (1969) (citation omitted).

The Study noted that "Customs, in numerous rulings * * *, has allowed free entry to American-made components assembled into foreign articles if, 'under the theory of constructive segregation,' the components are 'capable of being identified and removed without injury' to themselves or to the articles into which they have been assembled." United States Tariff Commission, *Tariff Classification Study,* sched. 8, part 1, p. 14. The Study states that:

> [t]he only classification which must be made for tariff purposes is the classification of the imported article as an entirety. The substance of the issue is what proof shall be required to satisfy customs officers—

(1) that an American part has been assembled into the imported article, and

(2) that such part was assembled therein without having been changed in condition.

Id.

Defendant contends that this language "states that item 807.00 was intended to do away with the doctrine [of constructive segregation]." The language quoted by plaintiff, however, indicates clearly that, if the component is "assembled * * * without having been changed in condition," it may be accorded American goods returned treatment even though it is classified together with the entity.

It is nonetheless beyond question that after a thorough consideration of the issue, the court in *John V. Carr*, stated that "the mere * * * repacking of goods, * * * [is] not sufficient to preclude the merchandise from being classified as returned American products under item 800.00 of the tariff schedules." *John V. Carr*, 69 Cust. Ct. at 93, 347 F. Supp. at 1400. *See also Border Brokerage*, 65 Cust. Ct. at 55–56, 314 F. Supp. at 792.

Furthermore, under the doctrine of constructive segregation, "American components *assembled into articles abroad* were held not to have been advanced in value if they could be identified and removed from the article without injury to themselves or to the article." *United States* v. *Baylis Bros. Co.*, 59 CCPA 9, 11–12, C.A.D. 1026, 451 F.2d 643, 646 (1971) (emphasis added). In this case, the American manufactured glass panels were not "assembled into" the imported merchandise. Rather, they were merely packed or packaged with the imported merchandise. As stated by plaintiff at oral argument, the glass panels were "wrapped in cardboard into a package with the stereo components * * *."

Headnote 1 to schedule 89 of the TSUS provides that "the rule of relative specificity in headnote 10(c) of the General Headnotes and Rules of Interpretation," does not apply to schedule 8. Thus, for item 800.00, TSUS, it is not necessarily true that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it * * *." General Interpretative Rule 10(c). Instead, headnote 1 of schedule 8 specifically directs that "any article which is described in any provision in this schedule is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met." In this case, it has been stipulated that "[a]ll administrative regulation requirements for entry under * * * Item 800.00, TSUS, have [been] complied with or waived."

Hence, it is the determination of the court that the glass panels are entitled to duty free entry under item 800.00, TSUS. Accordingly, plaintiff's alternative argument, that "the glass panels qualify for entry under item 807.00, TSUS, as U.S. products assembled abroad[,]" need not be considered.

CONCLUSION

In view of the foregoing, the court holds that the glass panels of the imported cabinets are entitled to duty free entry under item 800.00, TSUS. Accordingly, plaintiff's motion for summary judgment is granted in part.

(Slip Op. 89–168)

PENROD DRILLING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 87–02–00170, 87–04–00608, 87–10–01022, and 87–11–01073

[Defendant's motion to dismiss for lack of jurisdiction is granted.]

(Decided December 13, 1989)

Haight, Gardner, Poor & Havens (*John W. McConnell, Jr.*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Barbara M. Epstein*) for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff brings these actions to recover duties assessed by the United States Customs Service ("Customs") under section 466(a) of the Tariff Act of 1930, 19 U.S.C. § 1466(a) (1988), on entries of repairs (including the cost of equipment, parts and materials) completed on four of plaintiff's vessels abroad.[1] Defendant moves to dismiss the actions for lack of jurisdiction because plaintiff allegedly failed to pay all liquidated duties, charges or exactions prior to commencement of the actions as required by 28 U.S.C. § 2637(a) (1982). Defendant also maintains that two of the actions are jurisdictionally defective because the protests were untimely filed. Plaintiff claims jurisdiction is proper under 28 U.S.C. §§ 1581(a) and (i) (1982), and 28 U.S.C. §§ 2631 (a) and (i) (1982). Oral argument was heard on February 2, 1989.

BACKGROUND

In the four actions presently before the Court, Customs found the vessel repairs dutiable under § 1466(a) as they were "made in a foreign country upon a vessel documented under the laws of the United States * * *." 19 U.S.C. § 1466(a).[2] Plaintiff challenged the du-

[1]Each vessel's repairs consist of a separate entry and a separate court action, with its corresponding entry and court numbers. This opinion will deal with all four actions concurrently because of the similarity of the issues involved.

Vessel	*Entry No.*	*Court No.*
Penrod 97	84–100159–8	87–02–00170
Penrod 78	84–500396–1	87–04–00608
Penrod 74	84–100176–3	87–10–01022
Penrod 94	84–100169–5	87–11–01073

[2]19 U.S.C. § 1466(a) reads, in pertinent part, as follows:

Continued

tiability of the vessel repairs under § 1466(a) and sought remission (or refund) of those duties pursuant to § 1466(d).[3] The administrative procedure for challenging the duties is outlined in Customs regulation 19 C.F.R. § 4.14 (1988).

Plaintiff applied for relief under subsection (d) of 19 C.F.R. § 4.14, challenging the dutiability of the repairs under § 1466(a) and seeking remission under § 1466(d), but its application for relief was denied, as was its petition for review of the denial of its application for relief.[4] The entries were liquidated, and plaintiff protested the liquidations pursuant to 19 C.F.R. § 4.14(f) and Part 174 of the Customs Regulations.

The first two protests were dismissed as untimely filed, and the remaining two protests were deemed denied after plaintiff requested accelerated disposition.

Plaintiff now seeks review in this Court, under 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514, of Customs' denial of its protests and the finding that the vessel repairs were dutiable pursuant to § 1466(a). Alternatively, under 28 U.S.C. § 1581(i), plaintiff challenges the Secretary's decision not to grant remission or refund of duties. The alternative basis for jurisdiction is proper, plaintiff asserts, because claims challenging the denial of a remission or refund under § 1466(d) are subject to a different appeal route than the customary protest procedure, which here applies only to the treatment of the items or repairs dutiable under § 1466(a). *See* 19 C.F.R. § 4.14(f).

DISCUSSION

I. *Nonpayment of liquidated duties and exactions*

In an action contesting the denial of a protest, the payment of all liquidated duties, charges or exactions at the time the action is commenced is a condition precedent to invoking the jurisdiction of this Court. 28 U.S.C. § 2637(a); *see also American Air Parcel Forwarding Co.* v. *United States*, 6 CIT 146, 150, 573 F. Supp. 117, 120 (1983). An

(a) The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

[3]Section 1466(d) provides authority to the Secretary of Treasury ("Secretary") to remit or refund duties which qualify under the following three conditions:

(d) If the owner or master of such vessel furnishes good and sufficient evidence that—

(1) such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination;

(2) such equipments or parts thereof or repair parts or materials, were manufactured or produced in the United States, and the labor necessary to install such equipments or to make such repairs was performed by residents of the United States, or by members of the regular crew of such vessel; or

(3) such equipments, or parts thereof, or materials, or labor, were used as dunnage for cargo, or for the packing or shoring thereof, or in the erection of temporary bulkheads or other similar devices for the control of bulk cargo, or in the preparation (without permanent repair or alteration) of tanks for the carriage of liquid cargo; * * *.

[4]19 C.F.R. § 4.14(d)(2)(i) provides, in pertinent part, as follows:

(2) *Petition for review on a denial of an application for relief—(i) Form.* If an applicant is dissatisfied with the decision on its application for relief, the applicant may file a petition for review of that decision. The petition for review need not be in any particular form. The petition for review must identify the decision on the application for relief and must detail the exceptions taken to that decision * * *.

action is "commenced" for purposes of § 2637(a) when the summons is filed. *See* 28 U.S.C. § 2632(b); USCIT Rule 3; *Nature's Farm Products, Inc.* v. *United States,* 10 CIT 676, 677, 648 F. Supp. 6, 7 (1986), *aff'd,* 5 Fed. Cir. (T) 103, 819 F.2d 1127 (1987). Plaintiff filed four summonses in the respective actions without having paid all the duties and/or interest due. Therefore, all four cases must be dismissed as they have not satisfied the requirements of § 2637(a). These requirements are strictly applied and the statute precludes any exercise of discretion by the court. *United States* v. *Boe,* 64 CCPA 11, 16, C.A.D. 1177, 543 F.2d 151, 155 (1976); *Syva Co.* v. *United States,* 12 CIT ——, ——, 681 F. Supp. 885, 887 (1988); *Glamorise Foundations* v. *United States,* 11 CIT ——, ——, 661 F. Supp. 630, 632–33 (1987).[5]

Plaintiff argues that the jurisdictional requirements of § 2637(a) are inapplicable in these actions because the vessel repairs were entered prior to the effective date of 19 U.S.C. § 1505(c) (1988). Plaintiff's Memorandum at 16. In 1984, § 1505 was amended to add § 1505(c), which established interest on delinquent duties commencing on the 15th day after liquidation. Since the present merchandise was entered prior to the effective date of § 1505(c), plaintiff concludes that the interest assessed pursuant to the statute should not be included for jurisdictional purposes. Thus, except for Court No. 87–11–01073, all the duties would have been paid when the respective summonses had been filed. *See* Plaintiff's Memorandum at 16–17. The court in *Syva,* however, expressly held that § 1505(c) is applicable to merchandise entered before the effective date of the statute. 12 CIT at ——, 681 F. Supp. at 889–90.

> [Section 1505(c)] was intended to apply where duties were already assessed since they "would be due thirty days following enactment." Therefore, *there is no basis to conclude that only goods entered after the effective date of the statute would be subject to those time limits.*

Id. at ——, 681 F. Supp. at 890 (emphasis added). The liquidation is the operative event for purposes of § 1505(c). As the instant entries were liquidated after the statute's effective date, they are subject to interest payments, the nonpayment of which affects the jurisdictional requirements.

Plaintiff's attempt to distinguish *Syva* fails. The Court finds no merit in distinguishing *Syva* on the ground that the *Syva* plaintiff paid no interest whatsoever, whereas the interest remaining in the instant actions amounted to only nominal amounts. As the Court has already stated, § 2637(a) is to be applied strictly, no exception

[5]Plaintiff's related contention that payment prior to filing the complaint satisfies jurisdictional prerequisites because the suit "is not really activated * * * until a complaint is filed" is without merit. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 17 ("Plaintiff's Memorandum").

may be read into law for nominal amounts left unpaid at the time the summons is filed.[6]

The Court holds that since all duties, charges or exactions were not paid prior to the filing of the summonses, these actions are dismissed for lack of jurisdiction.

II. *Filing of a timely protest*

In addition to the four actions lacking jurisdiction because of the nonpayment of duties, Court Nos. 87–02–00170 and 87–04–00608 are also jurisdictionally defective because the protests were untimely filed.

A. *Court No. 87–02–00170*

Plaintiff filed the protest in this action on December 23, 1986, ninety-eight days after bulletin notice of liquidation was posted in the Customhouse (August 15, 1986). Plaintiff does not dispute that the filing of a protest within ninety days of liquidation and the subsequent denial thereof is a jurisdictional prerequisite for the Court to exercise subject matter jurisdiction over the involved action. *See* 19 U.S.C. § 1514(c)(2)(A) and 28 U.S.C. § 1581(a); *Frederick Wholesale Corp.* v. *United States,* 6 CIT 306, 309, 585 F. Supp. 640, 642 (1983), *aff'd,* 3 Fed. Cir. (T) 93, 754 F.2d 349 (1985); *United States* v. *A.N. Deringer, Inc.,* 66 CCPA 50, C.A.D. 1220, 593 F.2d 1015 (1979)).

However, plaintiff contends that there was no proof that the bulletin notice was ever posted in compliance with Customs regulation 19 C.F.R. § 159.9 (1988),[7] and further states that it first received notice in a Customs Service Bill on or before September 26, 1986.[8] *See* Plaintiff's Memorandum at 8. Plaintiff, thus, asks the Court to treat the date of receipt of the Bill as the proper date of notice of liquidation. The December 23, 1986 protest, then, would have been filed within the statutory ninety-day period.

Plaintiff's position is untenable. It is well settled that proper notice of liquidation refers to the bulletin notice of liquidation. *Goldhofer Fahrzeugwerk GmbH* v. *United States,* 13 CIT ——, 706 F. Supp. 892, *aff'd,* 885 F.2d 858 (Fed. Cir. 1989); *St. Regis Paper Co.* v. *United States,* 13 CIT ——, Slip Op. 89–166 (Dec. 11, 1989); *Timken Co.* v. *United States,* 6 CIT 75, 569 F. Supp. 65 (1983). Bulletin notice is the statutorily mandated notice: "the date of liquida-

[6]According to plaintiff, the following amounts were left unpaid when the summonses were filed:

Court No.	*Amount Overdue*
87–02–00170	$143.85
87–04–00608	964.82
87–10–01022	193.08
87–11–01073	12,539.96

Plaintiff's Memorandum at 15.

[7]19 C.F.R. § 159.9(c) reads as follows:

(c) *Date of liquidation*—(1) *Generally.* The bulletin notice of liquidation shall be dated with the date it is posted or lodged in the customhouse for the information of importers. The entries for which the bulletin notice of liquidation has been prepared shall be stamped "Liquidated," with the date of liquidation, which shall be the same as the date of the bulletin notice of liquidation. This stamping shall be deemed the legal evidence of liquidation.

[8]Plaintiff also makes these arguments with respect to Entry No. 84–500396–1 and the corresponding court action, Court No. 87–04–00608. The discussion of these issues will be handled jointly here since the resolution is equally applicable in both instances.

tion shall be the date the bulletin notice is posted in the customhouse." *United States* v. *Reliable Chemical Co.*, 66 CCPA 123, 127, C.A.D. 1232, 605 F.2d 1179, 1183 (1979); *Goldhofer*, 13 CIT at ——, 706 F. Supp. at 895. The importer bears the burden for examining all notices posted to determine whether its goods have been liquidated, and to protest timely. *Omni U.S.A., Inc.* v. *United States*, 11 CIT ——, ——, 663 F. Supp. 1130, 1133 (1987), *aff'd*, 840 F.2d 912 (Fed. Cir. 1988), *cert. denied*, 109 S.Ct. 56; *Goldhofer*, 13 CIT at ——, 706 F. Supp. at 895.

Moreover, there is a presumption of regularity which attaches to government acts. *United States* v. *Frank & Lambert*, 2 Ct. Cust. Appls. 239, 242, T.D. 31973 (1911). "It is presumed that public officials perform their duties in a manner consistent with law * * *." *Commonwealth Oil Refining Co.* v. *United States*, 60 CCPA 162, 167, C.A.D. 1105, 480 F.2d 1352, 1357 (1973); *see also INS* v. *Miranda*, 459 U.S. 14, 18 (1982); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). Plaintiff has put forth no evidence which would in any way rebut this presumption.

B. *Court No. 87–04–00608*

In this action, plaintiff allegedly delivered to Federal Express mail courier service on February 25, 1987 (expecting overnight delivery), documents purported to be a protest[9] under 19 U.S.C. § 1514. The ninety-day time period within which to file a valid protest expired on February 26, 1987. Customs received the protest papers from the carrier on February 27, 1987, one day after the protest period had expired, and dismissed the protest as untimely filed. Plaintiff now contends that it was Federal Express' failure which prevented the protest from being filed on time. And, since Federal Express' customary practice is to notify the sender in the event of untimely delivery, and since it allegedly failed to do so in this instance, plaintiff argues that the protest should be considered timely.

Plaintiff's obligation under the statute does not end upon delivery of the requisite documents to a mail carrier service within sufficient time to reach Customs. Even though Federal Express may have been negligent in not delivering the documents on time, such negligence does not operate to shift the statutory responsibility for filing a protest from plaintiff to Federal Express. Customs received the documents on February 27, 1989, the 91st day after notice of liquidation. The statute plainly requires filing within ninety days. Therefore, the action is untimely, and plaintiff's responsibility under the statute is not vitiated.

III. *Remission or Refund*

Customs Regulation 19 C.F.R. § 4.14 provides the avenue through which a party may seek remission or refund of duties for vessel repairs. *See Farrell Lines, Inc.* v. *United States*, 69 CCPA 1, 4–5,

[9]There is a dispute whether sufficient documentation existed to constitute a valid protest but there is no need to resolve this issue as the submission was untimely filed.

C.A.D. 1268, 657 F.2d 1214, 1217 (1981). Under the regulation, a party may file an application for relief within sixty days of arrival of the vessel, for either remission of duties or for the treatment of an item or a repair expense as dutiable under § 1466(a). 19 C.F.R. § 4.14(d). If its application for relief is denied, the party may file a petition for review under 19 C.F.R. § 4.14(d)(2)(i). Liquidation is suspended during both of these proceedings. If the petition is denied, a supplemental petition may be filed, but liquidation is no longer suspended. 19 C.F.R. § 4.14(d)(2)(iii).

Following liquidation, a protest may be filed "against the decision to treat an item or a repair *as dutiable under [§ 1466(a)].*" 19 C.F.R. § 4.14(f) (emphasis added). There is no equivalent directive regarding appeals from the Secretary's denial of remission or refund of duties. Defendant contends that the § 1466(d) remission decision is subsumed in the liquidation, and is protestable by protesting the liquidation. Plaintiff, on the other hand, argues that these appeals are not subject to the ordinary protest procedures since the statute and regulation fail to refer to them specifically or in conjunction with § 1466(a) classification appeals. If plaintiff is correct, jurisdiction may be found in this Court under § 1581(i), as meeting the exhaustion requirements under §§ 1514 and 1581(a), as well as the requirements of § 2637(a) would not be necessary. Plaintiff's failure to protest timely and to pay all outstanding duties upon commencement of the actions, therefore, would have no effect on § 1581(i) jurisdiction.[10] *See American Ass'n of Exporters* v. *United States,* 7 CIT 79, 84, 583 F. Supp. 591, 596, *aff'd,* 3 Fed. Cir. (T) 58, 751 F.2d 1239 (1985). Although the Court finds considerable merit in plaintiff's argument, jurisdiction under § 1581(i) is improper.

Customs, itself, recognized the ambiguity inherent within the statute when it proposed to amend § 4.14(f) because "the normal protest procedures set forth in Part 174 Customs Regulations * * * are not applicable to relief sought under section [1466(d)]." 49 Fed. Reg. 25,884, 25,885 (Dep't Treas. 1984) (withdrawal of proposed rule). A two year time limit after the date of liquidation of the vessel repair entry was proposed for filing § 1466(d) applications for relief. Customs withdrew the rule, finding the amendment "unnecessary," but not before emphasizing that "if the expenditure is alleged to warrant relief pursuant to § [1466(d)] * * * there [was] *no specific time limit after liquidation* of the entry within which a request for additional consideration of a claim must be filed." 48 Fed. Reg. 22,746 (Dept' Treas., 1983) (proposed rule) (emphasis added). Moreover, in denying plaintiff's petitions here, Customs stated that "a protest may not deal with questions of remission of duty on items

[10] It is well settled that the denial of a protest is a prerequisite to jurisdiction in this court and § 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available * * *." *Miller & Co.* v. *United States,* 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied,* 108, S.Ct. 773; *American Air Parcel Forwarding Co.* v. *United States,* 2 Fed. Cir. (T) 1, 4, 718 F.2d 1546, 1549 (1983), *cert. denied,* 466 U.S. 937 (1984). The jurisdiction granted under § 1581(i) is in addition to the jurisdiction conferred by subsections (a)-(h), and may not be used to bypass administrative review by meaningful protest. *United States* v. *Uniroyal, Inc.* 69 CCPA 179, 184, 687 F.2d 467, 472 (1982).

that are covered by the statute and are clearly subject to dutiable classification."

However, examination of case law and the statute reveals that the Secretary's decision is protestable. Protestable decisions are defined in 19 U.S.C. § 1514. Under that section,

> decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> * * * * * * *
>
> (2) the classification and rate and amount of duties chargeable;
>
> * * * * * * *
>
> shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

19 U.S.C. § 1514(a). The remission decision falls within the language of § 1514 since it is an official decision which affects the "amounts of duties chargeable" to plaintiff. Correspondingly, in *Farrell*, 69 CCPA at 5, 657 F.2d at 1217, our appellate court expressly stated that 19 U.S.C. § 1514(c)(2)[11] regarding protestable decisions applied to the challenge of a petition for remission of duties. *See also Chas, Kurz & Co.* v. *United States*, 12 CIT——, ——, 698 F. Supp. 268, 271 (1988).

Plaintiff misinterprets the law. At one time, there was a question concerning the propriety of the court's authority to review a remission decision. The *Farrell* decision finally quelled the controversy noting that in light of section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988) the court is authorized to determine whether the agency's decision was arbitrary, capricious, or otherwise not in accordance with law. But this review power is not a separate grant of jurisdiction to the Court of International Trade which obviates the need for meaningful protest. *See Nat'l Corn Growers Ass'n* v. *Baker*, 840 F.2d 1547, 1555–56 (Fed. Cir. 1988). "[T]he filing and denial of a protest will continue as prerequisites to the commencement of a civil action." *Id.* at 1556 (citations omitted).

The Court is cognizant that plaintiff may have been prejudiced by Customs' statement of refusal to entertain questions of remission at the protest level. However, strict adherence to the statute is mandatory. "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 *is or could have been available* * * *." *Id.* at 1557 (quoting *Miller*, 824 F.2d at 963). Plaintiff's remedy in the instant action was through the protest proce-

[11] 19 U.S.C. § 1514(c)(2) reads as follows:

(2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

dure and if Customs refused to hear the remission claims during protest, proper review in this Court was then possible upon a timely challenge as prescribed by statute. The Court is, therefore, constrained to deny plaintiff jurisdiction under § 1581(i) in all four actions.

(Slip Op. 89–169)

ROSES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES ET AL., INTERVENOR-DEFENDANTS

Court No. 84–08–01215

ROSES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES ET AL., INTERVENOR-DEFENDANTS

Court No. 84–10–01447

MEMORANDUM

[Actions challenging affirmative ITA determination dismissed after affirmance of ITC negative injury determination.]

(Decided December 14, 1989)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart* and *John M. Breen*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Shiela N. Ziff*) for the defendant.

Arnold & Porter (*Patrick F.J. Macrory*) for the intervenor-defendants.

AQUILINO, *Judge:* The above actions, which have been reassigned to me for disposition, challenge the final determination of the International Trade Administration, U.S. Department of Commerce ("ITA") of sales of fresh cut roses from Colombia at less than fair value and reported at 49 Fed. Reg. 30,765 (Aug. 1, 1984).

One of these actions was commenced before and the other after the U.S. International Trade Commission ("ITC") reached its final determination that an industry in the United States was not materially injured, or threatened with material injury, by reason of those sales of fresh cut roses. 49 Fed. Reg. 36,712 (Sept. 19, 1984), USITC Pub. 1575 (Sept. 1984). That determination became the focus of yet another action by the plaintiff, CIT No. 84–10–01371, which was also reassigned for disposition. After review and comparison of the three matters, the court decided first the challenge to the ITC determination per slip op. 89–115 (Aug. 18, 1989), 13 CIT ——, 720 F. Supp. 180, pursuant to which judgment entered, dismissing that action. No appeal has been taken, and that judgment is now final. *Cf.* 28 U.S.C. § 2107.

Under the law, an antidumping-duty order cannot issue on the record here in the face of the ITC's negative injury determination, notwithstanding the ITA's determination of sales at less than fair value. Hence, the question presented is the necessity of now deciding the points raised by the plaintiff in the above actions.

The parties themselves have recognized the contingent nature of the three actions. For example, the defendant interposed a motion to suspend No. 84–10–01447 pending resolution of the other two actions which was joined in support by the intervenor-defendants. On its part, the plaintiff has stated in the above actions that:

> * * * Briefing of the issues in these two cases would not have been in the interests of the Court, given that a ratification of the ITC's negative injury determination (challenged in Court No. 84–10–01371) would have rendered judicial consideration of these claims moot.[1]

The parties' perspectives are well-founded. The court is unable to conclude that the remaining points raised need to be discussed. All that is necessary is the entry of final judgments, dismissing the above actions.

[1]Plaintiff's Motion to Set Aside Orders of Dismissal for Want of Prosecution and Motion for Reassignment, p. 12.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C89/240	DiCarlo, J. November 14, 1989	Melcher & Landau, Inc.	85-9-01197	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	New Orleans Children's and infants' jackets, etc.
C89/241	DiCarlo, J. November 14, 1989	Melcher & Landau, Inc.	86-3-00312	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Seattle Children's and infants' jackets, etc.
C89/242	DiCarlo, J. November 14, 1989	Melcher & Landau, Inc.	87-9-00943	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/243	DiCarlo, J. November 14, 1989	M & L Int'l Co.	88-7-00546	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/244	DiCarlo, J. November 15, 1989	Delco Electronics	89-3-00125	Item 685.21, 685.23 or 685.12 Various rates	Item 685.29 or 685.32 6%	Delco Electronics v. U.S., S.O. 87-109 (1987)	Cleveland Circuit boards for automobile radios
C89/245	DiCarlo, J. November 15, 1989	Melcher & Landau, Inc.	85-9-01170	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/246	DiCarlo, J. November 15, 1989	Melcher & Landau, Inc.	88-7-00547	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Seattle Children's and infants' jackets, etc.
C89/247	DiCarlo, J. November 15, 1989	M & L Int'l Co.	88-1-00045	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/248	DiCarlo, J. November 16, 1989	Melcher & Landau, Inc.	86-3-00309	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/249	Tsoucalas, J. November 16, 1989	Huch Manufacturing Co.	87-4-00581	Item 657.25 Various rates	Item 646.56 or 646.42 Various rates	Agreed statement of facts	Not stated

C89/250	DiCarlo, J. November 20, 1989	Melcher & Landau, Inc.	85-9-01194	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/251	Re, C.J. November 28, 1989	Donjon Machine Co.	85-4-00595	Merchandise appraised on the basis of the value of the merchandise, imported, $300,00.00	Merchandise dutiable on the basis of agreed daily hire of $415.00 per day for the contemplated term of the lease, one month, or $12,450.00	Agreed statement of facts	New York Giant grab clamshell type bucket
C89/252	DiCarlo, J. November 29, 1989	A & A Int'l, Inc.	88-2-00167	Item 389.62 8c per lb. + 11%	Item 676.52 4.3%	Agreed statement of facts	Los Angeles Multi-strike printer ribbon cassettes
C89/253	DiCarlo, J. November 29, 1989	Bio-Rad Laboratories, Inc.	85-6-000862	Item 712.05 17.5%	Item 712.49 7.5%	Agreed statement of facts	San Francisco Spectrophotometers
C89/254	DiCarlo, J. November 30, 1989	Melcher & Landau, Inc.	85-9-01196	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/255	DiCarlo, J. November 30, 1989	Melcher & Landau, Inc.	86-3-00305	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/256	DiCarlo, J. November 30, 1989	Melcher & Landau, Inc.	86-3-00310	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	Chicago Children's and infants' jackets, etc.
C89/257	DiCarlo, J. November 30, 1989	Montgomery Ward & Co.	77-9-03983	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	San Francisco Children's and infants' jackets, etc.
C89/258	DiCarlo, J. November 30, 1989	Montgomery Ward & Co.	78-7-01260	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	San Francisco Children's and infants' jackets, etc.
C89/259	DiCarlo, J. November 30, 1989	Montgomery Ward & Co.	78-9-01627	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	San Francisco Children's and infants' jackets, etc.

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C89/260	DiCarlo, J. November 30, 1989	Montgomery Ward & Co.	85-1-00036	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	New York Children's and infants' jackets, etc.
C89/261	DiCarlo, J. November 30, 1989	Starlight Trading Co.	85-10-01478	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	New York Children's and infants' jackets, etc.
C89/262	DiCarlo, J. November 30, 1989	Starlight Trading Co.	88-7-00519	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	New York Children's and infants' jackets, etc.
C89/263	DiCarlo, J. December 4, 1989	Montgomery Ward & Co.	76-3-00716	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates	Agreed statement of facts	San Francisco Children's and infants' jackets, etc.
C89/264	DiCarlo, J. December 4, 1989	International Inex, Inc.	87-2-00291	Item 384.9152 or item 381.9530 Various rates	Item 384.760 or item 381.8664 Various rates (80% of difference between duties actually assessed and the above items)	Agreed statement of facts	Los Angeles Men's and women's jackets
C89/265	Restani, J. December 6, 1989	Guaina Corp. of America	88-5-00366	Item 355.25 Various rates	Item 359.60 Various rates	Bowe Co. v. U.S., Ct. No. 83-11-01590 (July 13, 1988)	Newark Modified bitumen roofing
C89/266	Neman, J. December 6, 1989	Caneca Instruments, Inc.	86-11-01491	Item 708.78 7.7%	Item 709.63 2.3%	Agreed statement of facts	Chicago Camebax/Micro X-ray micro-analysis
C89/267	Re, C.J. December 7, 1989	Dallas Ceramic Co.	82-12-01710	Item 540.27 34%	Item 540.21 6% or Item A540.21 Free of duty	Agreed statement of facts	Laredo Glass Fruit

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V89/16	Aquilino, Jr. November 3, 1989	Allied Int'l Inc.	83-7-01078	Cost of production	At invoice unit value plus the agent's commission, packed, without the addition for domestic insurance, inland freight, port expenses and extra war risk insurance	Agreed statement of facts	Not stated Hardboard
V89/17	Re, C.J. November 16, 1989	Topp Electronics Inc.	79-4-00696	Constructed value	Various values specified on the entry papers by the liquidating officer excluding one-half of the amount added for assists	Agreed statement of facts	Los Angeles Not stated
V89/18	Re, C.J. November 16, 1989	Topp Electronics Inc.	80-0-01336	Constructed value	Various values specified on entry of facts papers by the liquidating officer excluding one-half of the amount added for assists	Agreed statement of facts	New York Not stated
V89/19	Carman, J. November 17, 1989	Garland Commercial Industries, Inc.	86-8-00998	Transaction value	Invoice unit values Canadian dollars, net packed as set forth on invoices	Agreed statement of facts	Buffalo Commercial cooking equipment
V89/20	Carman J. November 17, 1989	Garland Commercial Industries, Inc.	86-12-01547	Transaction value	Invoice unit values Canadian dollars, net packed as set forth on invoices	Agreed statement of facts	Buffalo Commercial cooking equipment
V89/21	Carman, J. November 17, 1989	Garland Commercial Industries, Inc.	87-5-00660	Transaction value	Invoice unit values Canadian dollar, net packed as set forth on invoices	Agreed statement of facts	Buffalo Commercial cooking equipment
V89/22	Carman, J. November 17, 1989	Garland Commercial Industries, Inc	87-10-01031	Transaction value	Invoice unit values, Canadian Dollars, net packed as set forth on invoices	Agreed statement of facts	Buffalo Commercial cooking equipment

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